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|-------------------------------|---|-------------------------|
| CLAUDIA PHAUP                 | ) |                         |
| (Widow of DONALD W. PHAUP)    | ) |                         |
|                               | ) |                         |
| Claimant-Petitioner           | ) |                         |
|                               | ) |                         |
| v.                            | ) |                         |
|                               | ) |                         |
| NEWPORT NEWS SHIPBUILDING AND | ) | DATE ISSUED: 03/29/2006 |
| DRY DOCK COMPANY              | ) |                         |
|                               | ) |                         |
| Self-Insured                  | ) |                         |
| Employer-Respondent           | ) | DECISION and ORDER      |

Appeal of the Decision and Order of Richard E. Huddleston,  
Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.),  
Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport  
News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY  
and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-01886) of Administrative Law Judge Richard E. Huddleston rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Donald Phaup, the decedent, worked for employer for various periods of time beginning in 1957 until his death in 2000. He was exposed to airborne asbestos in the course of his employment and died of lung cancer on April 15, 2000. An autopsy was performed, and after review of the slides, Dr. Legier opined that the decedent's lung

cancer was linked to his asbestos exposure. Thereafter, claimant, decedent's widow, filed a claim for death benefits under the Act. 33 U.S.C. §909.

In his decision, the administrative law judge invoked the Section 20(a) presumption that the decedent's death was causally related to his work-place exposure to asbestos. 33 U.S.C. §920(a). However, the administrative law judge found that employer established rebuttal of the presumption based on the opinion of Dr. Wick, who found that there are no pathologic findings to corroborate the presence of asbestosis, which, he states, is a necessary prerequisite to link asbestos exposure to carcinoma of the lung. The administrative law judge then weighed the evidence as a whole and found that the medical community is split on the question of whether asbestosis is a prerequisite for a finding that lung cancer is related to asbestos exposure. In addition, the administrative law judge found that claimant offered evidence regarding the "synergistic effect" between asbestos exposure and cigarette smoking, but that employer offered equally probative contrary evidence. Thus, the administrative law judge concluded that as the evidence submitted is equally probative on this issue, claimant did not establish a causal relationship between her husband's death and his employment, and he denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to give determinative weight to Dr. Legier's opinion and in failing to fully consider the synergistic effect between decedent's asbestos exposure and his smoking. Employer responds, urging affirmance of the administrative law judge's decision.

Once, as in the instant case, claimant establishes a *prima facie* case, the Section 20(a), 33 U.S.C. §920(a), presumption applies to relate decedent's death to his employment. Employer can rebut this presumption by producing substantial evidence that the decedent's death was not related to his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999). If employer rebuts the presumption, as here, it no longer controls and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the present case, an autopsy was performed on April 17, 2000, by Dr. Greeley. Cl. Ex. 4. Dr. Greeley noted "markedly increased asbestos burden with fibrous pleural plaques of parietal pleura involving diaphragmatic and chest wall surfaces," and opined that the markedly increased asbestos burden within the lungs was likely to be a causative factor in the development of decedent's adenocarcinoma and subsequent death. *Id.* Dr. Legier reviewed the autopsy materials and agreed that the decedent's pulmonary

adenocarcinoma was caused by his occupational exposure to asbestos, based on the “extreme asbestos fiber burden within the lung.” Cl. Ex. 5. However, Dr. Legier stated that there was no evidence that the decedent suffered from asbestosis and agreed that reasonable pathologists can differ on the issue of whether asbestosis is necessary prior to making an attribution of the lung cancer to asbestos exposure. Cl. Ex. 25 at 11. The record also contains the report of Dr. Wick who stated that there are no pathologic findings to corroborate the presence of asbestosis, which he states is a necessary prerequisite to link asbestos exposure to carcinoma of the lung. Therefore, Dr. Wick opined that the sole cause of the decedent’s lung cancer was tobacco use. Emp. Ex. 1. In addition, the record contains the opinion of Dr. Churg who stated that it is impossible to attribute the decedent’s tumor to occupational asbestos exposure, as he clearly did not have any kind of parenchymal fibrosis or asbestosis. Emp. Ex. 2.

After reviewing the medical reports of record, and the supporting journal articles, the administrative law judge found that the evidence regarding whether lung cancer can be attributed to asbestos exposure without a diagnosis of asbestosis lies in equipoise. Decision and Order at 12. As the administrative law judge noted, Dr. Legier testified that reasonable pathologists could disagree on this issue. Emp. Ex. 14-18. In addition, the administrative law judge found that the evidence regarding whether the combination of smoking and asbestos exposure accentuates the risk of the development of lung cancer, is countered by the evidence that a synergistic effect takes place only when asbestosis is present. *Id.* Thus, the administrative law judge concluded that as the evidence is in equipoise, claimant did not bear her burden of persuasion that the decedent’s death due to lung cancer was causally related to his occupational asbestos exposure.

The instant case contains conflicting medical evidence, and it is well established that the administrative law judge is entitled to weigh the medical evidence of record and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). Moreover, the Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. 33 U.S.C. §921(b)(3); *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4<sup>th</sup> Cir. 1994). Contrary to claimant’s contention, the administrative law judge was not required to find Dr. Legier’s opinion better supported by the medical literature. Based on his reasonable determination that each medical expert is highly qualified and experienced, and has literature to support his opinion, the administrative law judge rationally concluded that the evidence is in equipoise and, therefore, that claimant did not meet her burden of persuasion on the issue of the work-

relatedness of decedent's death. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995)(Decision on Recon.). Thus, we affirm as rational and supported by substantial evidence the administrative law judge's finding that claimant did not establish by a preponderance of the evidence that decedent's lung cancer and death were work-related. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge